In short, what the learned judge is saying is that the application in this Originating Summons is bad in law, having been made under an Act which cannot apply where there is no divorce petition between the parties, and having so found she should have dismissed the Originating Summons without more ado. However, instead of doing so what the learned judge did was to adopt a most unusual course. She held that the appellant should have made this application under section 5 of the Guardianship of Infants Act 61 which confers guardianship of an infant to the father with the mother having care and control of the infant. In fact she treated this Originating Summons as if it was an application made under the Guardianship of Infants Act 1961, and then after considering the evidence available, decided that the respondent's behaviour had in no way given the impression that he had abandoned the custody of his son altogether. The only reasonable inference is that even if the application had been made under that section she would have declined to exercise her discretion in favour of the appellant.

With respect we think that what did she was to give a judgment in the alternative. It may well be that in an action for damages, the judge having held that the defendant is not liable may then proceed to set out, in the event of a successful appeal against that decision, an assessment of the damages which she would have awarded if the plaintiff had been successful.

However, in the context of the present appeal, the learned judge is not free to hold in the first place that she had no jurisdiction under the Law Reform (Marriage and Divorce) Act 1976 and then proceed to consider the application in the light of other laws not relied upon by the plaintiff/appellant. Such a judgment in the alternative would be wrong indeed. Having held that she had no jurisdiction she would have dismissed the Originating Summons then and there after which, of course, the Supreme Court could give proper directions in the event of a successful appeal.

We hold that the three Acts (Law Reform (Marriage and Divorce) Act 1976, the Guardianship of Infants Act 1961 and the Married Women and Children (Maintenance) Act 1950) are all applicable depending on the circumstances of a particular case and that in the state of affairs surrounding this appeal the application under section 88(3) was properly made. There would be no need for the parties to wait, until perhaps the unlikely event of their commencing a divorce action before making such application. For this reason we allow this appeal.

The next step presents some difficulty. It will be inappropriate for us to remit this Originating Summons back to the same judge for a rehearing because of the view she held on the facts in the alternative judgment.

Therefore we would order that, if the appellant so desires, she may proceed with the Originating Summons before another judge of the High Court.

Costs here and below to the appellant. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Ng Ek Teong & Partners; Syarikat Davidson.*

SYARIKAT JOO SENG & ANOR. v. HABIB BANK LTD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C.JJ.) February 5, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 141 of 1985]

Practice and Procedure – Judgment in default of appearance – Claim based on deceit or conspiracy to defraud – Leave to be obtained to enter judgment – Irregular judgment – Party entitled ex debito justitiae to have judgment set aside – R.H.C. 1980 O. 2 r. 1 & O. 19 rr. 7 & 9 – R.S.C. 1980, r. 57 – Courts of Judicature Act, 1964, s. 44(1).

In this case the respondents had taken out a writ against the appellants claiming a declaration (a) that the first appellant had received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount; (b) that the second appellant received money as money had and received to the use of the respondents and ordering the first appellant to repay the amount. The appellants entered a conditional appearance and applied to strike out both the writ and the statement of claim. The application was dismissed on June 4, 1984 and notice of appeal was filed on June 29, 1984. However on June 22, 1984 the respondents without obtaining leave of the court or a judge entered a judgment in default of defence against the appellants. The appellants applied to set aside the default judgment and this was refused in the High Court. The appellants appealed.

Held: (1) in this case the respondents should have complied with Order 19 rule 7(1) of the Rules of the High Court by applying to the court or a judge for leave to enter judgment against the appellants. This they failed to do and therefore the judgment was an irregular judgment obtained in direct contravention of Order 19 rule 7(1). The appellants are therefore entitled *ex debito justitiae* to have the default judgment set aside;

(2) as the respondents had no right to enter a judgment in default of defence under Order 19 rule 7(1) without the leave of the court, Order 2 rule 1 of the Rules of the High Court, 1980, does not apply to a default judgment or one obtained contrary to Order 19 rule 7(1). The word "proceedings" in Order 70 rule 1 does not include an "irregular judgment in default of defence";

(3) the learned judge in this case misread rule 57 of the Rules of the Supreme Court and was clearly mistaken resulting in an erroneous construction as to the effect of the rule.

Cases referred to:

(1) *Evans* v. *Bartlam* [1937] A.C. 473, 479-480.
(2) *Anlaby & Ors.* v. *Praetorius* (1888) 20 Q.B.D. 764.
(3) *Mac Foy* v. *United Africa Co. Ltd.* [1962] A.C. 152.
(4) *White* v. *Weston* [1968] 2 W.L.R. 1459; [1968] 2 All E.R. 842.
(5) *Ratnam* v. *Cumarasamy & Anor.* [1965] 1 M.L.J. 228, 229.

SUPREME COURT.

Harpal Singh for the appellants.
Yip Fook Thai for the respondents.

Seah S.C.J. (delivering the Judgment of the Court): We allowed the appeal with costs here and below to be taxed, set aside the Judgment in default of defence and ordered both the appellants to deliver their statement of defence within twenty-one days from date thereof. We intimated that we would give our reasons in writing which we now do.

The relevant facts for the purpose of this appeal may be briefly stated. The respondents are a licensed bank carrying on business in Malaysia and on December 31, 1983 they took out a writ against both the 1st and 2nd appellants. According to the statement of claim dated January 6, 1984 the respondents claim from the appellants the following reliefs:

(1) A declaration that the first Defendants received the sum of S$1,500,000 as money had and received to the use of the Plaintiffs and an order that the first Defendants repay the amount to the Plaintiff.

(2) A declaration that the second Defendant received the sum of S$4,696,500 as money had and received to the use of the Plaintiffs and an order that the second Defendant repay the amount to the Plaintiffs.

(3) Damages for deceit and/or conspiracy and/or conversion of moneys.

(4) Interest.

(5) Such further or other remedy as the Court may deem just and proper.

The appellants entered a conditional appearance and applied to strike out both the writ and the statement of claim. This was dismissed on June 4, 1984 and notice of appeal was filed on June 29, 1984. But on June 22, 1984 the respondents without obtaining leave of the Court or a Judge, entered a Judgment in default of defence in the undermentioned terms:

"No defence having been served by the Defendants herein, *IT IS THIS DAY ADJUDGED* that the First Defendant do pay the Plaintiffs the sum of S$1,500,000.00 and the Second Defendant do pay the Plaintiffs the sum of S$4,696,500.00 respectively with interest *AND IT IS THIS DAY FURTHER ADJUDGED* that the Defendants do pay the Plaintiffs damages for deceit and/or conspiracy and/or conversion of moneys to be assessed and costs $240.00.

On August 3, 1984 application was made by the appellants to set aside the default judgment. This was refused by the learned judge with costs who then granted a certificate that he required no further argument pursuant to section 68(2) of the Courts of Judicature Act 1964. Hence this appeal.

Now, Order 19 rule 9 of the rules of the High Court 1980 gives a discretionary power to the judge in chambers to set aside a default judgment. This discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence [per Lord Atkin in *Evans* v. *Bartlam*.[1]]

In *Anlaby & Ors.* v. *Praetorius*[2] it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. This case was considered by the Privy Council in

MacFoy v. *United Africa Co. Ltd.*[3] and by the Court of Appeal in *White* v. *Weston.*[4] We would adopt this guideline in exercising the discretion contained in Order 19 rule 9. To quote Lord Guest in *Ratnam* v. *Cumarasamy & Anor.*[5] "The Rules of Court must *prima facie* be obeyed." A fortiori, when the rules regulate how a default judgment may be obtained or given. There are good grounds why that should be so, because the entry of judgment is a serious matter, leading to the issue of execution and possibly bankruptcy proceedings.

In our opinion, Judgment in default of defence may be entered by the plaintiff either by way of final or interlocutory judgment in the following circumstances *viz.* when the claim of the plaintiff consists of:

(a) Order 19 rule 2 (liquidated demand);

(b) Order 19 rule 3 (unliquidated damages only);

(c) Order 19 rule 4 (detention of movable property only) and

(d) Order 19 rule 5 (possession of immovable property only).

In this case, the claim of the respondent seems to be grounded on (a) deceit and/or (b) conspiracy to defraud/deceive. Since the respondents are unable to bring their case under any of the above rules, they should comply with rule 7(1) by applying to the Court or a Judge for leave to enter judgment against the appellants. This they had failed to do and in our judgment, following *Anlaby* case, the Judgment in default of defence dated June 22, 1984 was an irregular judgment as it was obtained in direct contravention of Order 19 rule 7(1). Applying the principle laid down in *Anlaby* case the appellants are entitled *ex debito justitiae* to have the default judgment set aside.

For these reasons we think the learned judge failed to exercise his discretion judicially when he dismissed the application with costs instead of allowing it.

Next, we were pressed with the argument that Order 2 rule 1 of the Rules of the High Court 1980 gives a discretion to the Court or a Judge which seems to apply here. This point was raised in *Anlaby* case in relation to Order 70 rule 1 of the English Rules of the Supreme Court 1883 which is in pari materia with our former Order 70 rule 1 of the Rules of the Supreme Court 1957 (since repealed) and Fry L.J. at page 769 answered it as follows:

> "but in the present case we are not concerned with an instance of non-compliance with a rule, nor with an irregularity in acting under any rule. The irregular entry of judgment was made independently of any of the rules; the plaintiff had no right to obtain any judgment at all. I do not think, therefore, that the case comes within rule 1 and we must consider what is the right practice without reference to that rule."

At pages 770-771 Lopes L.J. said:

> "I entirely agree that Order 70 rule 1 does not apply here. It was meant to apply where a party had made some blunder in his proceedings, as by delivering a pleading too late; but the present case seems to me altogether outside the operation of rule 1 because the judgment was entered prematurely, without any right whatsoever. To obtain that judgment was a wrongful act, not an act within any of the rules. The defendant is therefore entitled *ex debito justitiae* to have it set aside."

In other words, the word "proceedings" in Order 70 rule 1 did not include an "irregular judgment in default of defence". We are aware that Order 70 rule 1 of the Rules of the Supreme Court 1957 has now been repealed and replaced by Order 2 rule 1 of the Rules of the High Court 1980 and that the wordings in Order 2 rule 1 are not the same as that of Order 70 rule 1. We have considered this question but we find that the word "proceedings" continue to be used in Order 2 rule 1. By retaining the word "proceedings" we think we are entitled to assume that the Rule Committee who drafted the Rules of the High Court 1980 in exercise of the powers conferred on them under section 17 of the Courts of Judicature Act 1964 did not intend to make any changes in the interpretation of the word and that the word used should bear the same old meaning.

As the respondent had no right to enter a judgment in default of defence under Order 19 rule 7(1) without the leave of the Court or a Judge and adopting the construction laid down in *Anlaby* case, we are perforced to hold that Order 2 rule 1 of the Rules of the High Court 1980 does not apply to a default judgment or one obtained contrary to Order 19 rule 7(1) thereof.

There is one other matter we like to touch upon. Dealing with a stay of execution the learned judge quoted rule 57 of the Rules of the Supreme Court 1980 as follows:

"An appeal shall not operate as a stay of execution *or of proceedings* (emphasis provided) under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct."

We have examined rule 57 and we find that the word "or" does not appear therein and that the correct rule 57 reads:

"An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct."

The learned judge was clearly mistaken resulting, in our opinion, in an erroneous construction as to the effect of the rule. We think we ought to point out this misquotation and wrong emphasis placed by the learned judge lest the same mistake might be repeated. In our opinion, the answer to such dilemma faced by the appellants in such a situation may be found in section 44(1) of the Courts of Judicature Act 1964.

Order accordingly.

Solicitors: *A.J. Ariffin, Chong & Harpal.*

CHAI KAH SIM v. ISHAK BIN SAAD

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) December 2, 1985 & February 18, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 244 of 1984]

Tort – Collision between motor lorry and motor-cycle – Parties found equally to blame – Question of fact – Appeal.

In this case there was an accident between a motor lorry driven by the appellant and a motor-cycle ridden by the respondent. The learned trial judge found both parties equally to blame and assessed the damages at 50% in favour of the respondent/plaintiff. The appellant appealed.

Held, dismissing the appeal: in this case the learned trial judge had made an inference from the facts, which was based on circumstantial evidence, both oral and documentary, which were sufficient and conclusive as to entitle the learned judge to make a proper inference. In the circumstances it was the only reasonable and irresistible inference. It is not proper for the appellate court to upset his finding. The respondent had proved that the accident was caused to some extent by the fault of the appellant.

SUPREME COURT.

Joga Singh Dhalliwal for the appellant.
Jodgis Singh Sandu for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This is an appeal against the decision of the High Court Judge sitting in Ipoh, in the State of Perak. The appellant was the driver of motor lorry AX 3516 which was involved in an accident with motor-cycle AAF 7095 ridden by the respondent at the 24th milestone Kuala Kangsar/Ipoh main road on September 10, 1982 at about 11.50 a.m. The learned Judge found both parties equally to blame for the accident and accordingly assessed the damages at fifty per cent in favour of the respondent/plaintiff. The appellant being dissatisfied appealed against the decision on liability only but not against the decision on the quantum of damages.

The undisputed facts as accepted by the trial Judge were that the two vehicles were negotiating a sharp corner along the road approaching each other from the opposite directions. The motor-cycle was proceeding from Kuala Kangsar towards Ipoh and the lorry was travelling from Ipoh towards Kuala Kangsar. The respondent was negotiating a left-hand bend and the appellant a right-hand bend when the accident occurred. Immediately after the collision, the lorry came to a stop over the left edge of its side of the road facing towards Kuala Kangsar. The motor-cycle was lying in the middle of the road across the centre white line. Its front wheel and part of its body occupied its side of the road while the other half occupied the lorry's side of the road.

The parties gave conflicting versions of the manner in which the accident occurred as noted by the trial Judge. According to the respondent, he was riding his motor-cycle about two feet from the left edge of the road and while negotiating the bend he collided against the rear off-side wheel of the oncoming lorry. After that, he could not remember anything else. On the other hand, the appellant testified when approaching the bend he saw the respondent coming straight at his lorry. He tried to swerve to the left to avoid a collision but the respondent's motor-cycle collided against the front of the rear off-side tyre of the lorry. In the light of the contradictory versions, the learned Judge took into consideration the other available evidence, *viz.*, the sketch plan and photographs of